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No. 903 (30)

Supreme Court of the United States.

OCTOBER TERM, 1943.

GEORGE LAWLEY & SON CORPORATION,
Defendant, Appellant,

v.

CHARLES J. SOUTH,
Plaintiff, Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

PAUL B. SARGENT,
Attorney for Petitioner.

Of Counsel:
Varnum Taylor,
Wm. Gardner Perrin.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

	Page
PETITION	1
Statement	1
Statutes and regulations under consideration	2
Jurisdiction	2
Questions presented for consideration	3
Reasons relied upon for allowance of writ of certiorari	4
Prayer for writ	5
BRIEF	6
Opinion of the Circuit Court of Appeals for the First Circuit	6
Jurisdiction	6
Statement of the case	6
Specification of errors	6
Points to be discussed	6
Argument	8
Conclusion	17
Appendix	18

Table of Authorities Cited.

CASES.

Anuchick v. Trans-American Freight Lines, 46 Fed. Supp. 861	11
Brown v. Carter Drilling Co., 48 Fed. Supp. 489	12
Chas. W. Gale v. Fruehauf Trailer Co., Kans. Supreme Court No. 35,963 (Jan. 22, 1944)	11
Fox v. Standard Oil Co., 294 U.S. 87	8
Ling v. Currier Lumber Co., 50 Fed. Supp. 204	12
Mortenson v. Western Light & Tel. Co., 42 Fed. Supp. 319	11
Munkens v. 1412 Broadway, Inc., 50 Fed. Supp. 632	11
Northern Pacific R.R. v. Concannon, 239 U.S. 382	15
O'Heron v. Gray, 168 Mass. 573	10

	Page
Overnight Transp. Co. v. Missel, 316 U.S. 572	16
Rigopoulos v. Kervan, 47 Fed. Supp. 576	11
United States v. Missouri-Pacific R.R., 278 U.S. 269	14
Wilkinson v. Noland, 40 Fed. Supp. 1009	12
Williams v. Jackson Terminal Co., 35 Fed. Supp. 267; 118 Fed. (2d) 324; 315 U.S. 386	11
STATUTES.	
Fair Labor Standards Act of 1938, 52 Stat. 1060 et seq., 29 U.S.C. 209-219	8 et seq.
Regulations 541.1	12
Regulations 541.1 (F)	12, 13
TEXTBOOKS.	
21 Corpus Juris, p. 1169	10
59 Corpus Juris, 953 et seq.	14
59 Corpus Juris, 958	14

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Plaintiff, Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Your petitioner, George Lawley & Son Corporation, respectfully submits the following petition for a writ of certiorari and prays that the same may issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit which was entered February 4, 1944, affirming a judgment of the District Court of the United States for the District of Massachusetts.

Statement.

The original suit was brought by the plaintiff appellee, Charles J. South, in the District Court of the United States for the District of Massachusetts. The case was tried before Ford, J., and a jury, and judgment was entered for

the plaintiff appellee on a special verdict. Your petitioner appealed to the United States Circuit Court of Appeals for the First Circuit, which on February 4, 1944, affirmed the lower court's judgment by a split decision.

The plaintiff's action was founded on the so-called Fair Labor Standards Act of 1938, 52 Stat. 1060 *et seq.*, 29 U.S.C. secs. 201-219, hereinafter referred to as "the Act."

The facts of the case, so far as they are applicable to the present petition, are set forth adequately in the opinion of the Circuit Court of Appeals, which opinion is printed in the Record, pp. 235 to 245, and is incorporated herein by reference. In order not to overextend the petition, it will suffice to say here that the plaintiff appellee sought to recover overtime wages at time and a half his regular salary for a period commencing with the inception of the Act, namely, October 24, 1938, and ending with the date he was asked to resign as treasurer of the defendant appellant, October 27, 1941.

Statutes and Regulations under Consideration.

The statute under which the plaintiff sought to recover is the Fair Labor Standards Act of 1938, 52 Stat. 1060 *et seq.*, 29 U.S.C. secs. 209-219, and the regulations thereunder, which are found in title 29, c. 5, Code of Federal Regulations, part 541. The pertinent provisions of the statute and the regulations will be found in the appendix on pages 18-28 and are incorporated herein by reference.

Jurisdiction.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of

February 13, 1925, c. 229, sec. 1; 43 Stat. 938; 28 U.S.C. sec. 347. Judgment of the Circuit Court of Appeals for the First Circuit was entered February 4, 1944.

Questions Presented for Consideration.

The questions presented for consideration are: Was the Circuit Court of Appeals in error—

(1) In holding that the plaintiff appellee was not estopped from claiming overtime in whole or in part;

(2) In holding that the plaintiff appellee was not a *bona fide* executive or administrative official;

(3) In holding that the Administrator's regulations issued by authority of the Act, particularly with reference to section 541.1 (F), should not be construed to mean what the grammatical construction thereof would indicate;

(4) In holding that the Act itself "must be applied literally according to its words" (R. p. 242), but that the regulations interpreting the Act must not be applied literally according to their grammatical construction, because the Circuit Court of Appeals does "not think that the Administrator could have meant exactly what he said" (R. p. 243);

(5) In failing to consider and pass upon the following points of law set forth in the defendant appellant's brief on its appeal to the Circuit Court of Appeals:

(*a*) The verdict of the jury was in such a form that no monetary damages could be legally awarded to the plaintiff appellee; and

(*b*) Judgment should not have been entered for the plaintiff appellee in the sum of $6866.11;

(6) In affirming the judgment for the plaintiff of the District Court for the District of Massachusetts?

Reasons Relied upon for Allowance of Writ of Certiorari.

(1) The problems inherent in this case involve an important question of Federal law which has not been and should be settled by this Court, namely, the interpretation of the Act and its validity.

(2) The Circuit Court of Appeals has decided a question of interpretation of language used in statutes and regulations contrary to the decisions of local and Federal legal rules of interpretation, namely, that if words and phrases and sentences are clear and unambiguous, they must be construed to mean what they grammatically say.

(3) The decision of the Circuit Court of Appeals sanctions an act by the District Court which departs from the accepted and usual course of judicial proceedings in that the Circuit Court of Appeals permitted a monetary judgment to be entered for the plaintiff appellee based upon an uncertain and indefinite special verdict of the jury.

(4) Although the decision of the Circuit Court of Appeals is not in conflict with decisions of any other Circuit Courts of Appeals which are known to the petitioner, it is in conflict with decisions of District Courts of the United States (see *Mortenson* v. *Western Light & Telegraph Co.*, 42 Fed. Supp. 319) and in conflict with a decision of the Supreme Court of Kansas, rendered in the case of *Gale* v. *Fruehauf Trailer Co.*, Kansas Supreme Court No. 35,963, January 22, 1944, and therefore the opinion in the present case should be reviewed by this Court for the purpose of establishing a uniform rule of law for the guidance of other Circuit Courts of Appeals and Federal District Courts and State Supreme Courts.

Prayer for Writ.

It is therefore respectfully requested that this petition be granted and that a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit issue.

Respectfully submitted,

PAUL B. SARGENT,
Counsel for the Petitioner.

Of Counsel:
VARNUM TAYLOR,
WM. GARDNER PERRIN.

BRIEF IN SUPPORT OF PETITION.

Opinion of the Circuit Court of Appeals for the First Circuit.

The opinion of the Circuit Court of Appeals is printed in the Record, pp. 235-245, and is incorporated herein by reference.

Jurisdiction.

The jurisdiction of this Court is set forth in the petition.

Statement of the Case.

The case has been stated in the petition and is set forth in the opinion of the Circuit Court of Appeals, which appears in the Record and is incorporated herein by reference.

Specification of Errors.

A specification of errors is set forth in the petition and is incorporated herein by reference.

Points to be Discussed.

The points to be discussed are as follows:

I. The plaintiff appellee should have been estopped from recovery for overtime, and thus the Circuit Court of Appeals erred in sustaining the District Court's refusal to grant a directed verdict for the defendant appellant and in sustaining the District Court's refusal to charge the

jury as requested in the defendant appellant's requests for rulings numbered 13 and 14.*

II. The plaintiff appellee was a *bona fide* executive or administrative official as defined by the Act and the regulations issued by the Administrator under the authority granted him in the Act.

III. If the Act itself must be applied literally according to its words, the regulations interpreting the Act must likewise be applied literally according to their grammatical construction, and the Circuit Court of Appeals erred in applying the Act literally and not applying the regulations literally according to their grammatical construction.

IV. The verdict of the jury was in such a form that no monetary damages could be legally awarded the plaintiff, and therefore judgment should not have been entered for the plaintiff in the sum of $6866.11 and the Circuit Court of Appeals erred in sustaining the lower court's dismissal of the defendant's motion for a new trial by failing to pass upon it in its opinion.

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*"13. If the jury finds that it was the plaintiff's duty as office manager or treasurer to keep or supervise the keeping of records of the defendant's employees' wages, hours and overtime and if the jury finds that the plaintiff did not keep a record of his alleged overtime other than his own personal record kept by himself or his wife, he should be estopped from now claiming unpaid wages for such alleged overtime under Sections 6 and 7 of the Fair Labor Standards Act of 1938.

"*Mortenson* v. *The Western Electric Light & Tel. Co.*, 42 Fed. Supp. 319 (November 10, 1941).

"14. If the jury finds that it was a part of the plaintiff's duties to keep a record or supervise the keeping of a record of the wages, hours and overtime of the defendant's employees, but that the plaintiff did not enter on such records his own hours and overtime, then such failure to record his hours and overtime was a breach of Section 11 (c) of the Fair Labor Standards Act of 1938 and the plaintiff cannot benefit from his own wrong.

"*Mortenson* v. *The Western Electric Light & Tel. Co.*, 42 Fed. Supp. 319 (November 10, 1941)."

Argument.

I. The plaintiff appellee should be estopped from recovering overtime compensation.

A. The plaintiff was an employer himself within the meaning of the Act and thus is estopped and should not recover for his own violation of the law which gave rise to his claim. Section 3 (d) of the Act defines an employer as follows:

> "Employer includes any person acting directly or indirectly in the interests of an employer in relation to an employee."

The plaintiff on his own evidence acted directly in the interests of the defendant in relation to other employees, in that it was his duty to keep, and he did so keep (R. pp. 88-90), the record of the regular pay and overtime pay of all the defendant's office staff, except that of his own (R. pp. 183, X-Q. 1421), of which group he claimed to be a member, and by virtue of which membership he claims overtime compensation. Furthermore, the plaintiff was a director and treasurer of the defendant corporation (R. p. 61, Qs. 96, 97, 98), was familiar with the Wages and Hours Act (R. p. 115, X-Q. 749), knew the defendant was obliged to keep adequate records of employees' overtime (R. p. 116, X-Q. 752), and knew there was a penalty for failure to do so (X-Q. 753). The plaintiff's testimony thus brings him within the definition of an employer, and since he himself as an employer was guilty of a violation of the Act in failing to keep a record of and pay himself overtime if it was due him, he should be estopped from recovery.

It has been held that, where a statute defines the meaning of words used therein, the statutory definition must prevail, regardless of what other meanings may be attributable to it by other authorities or even by common understanding.

Fox v. *Standard Oil Co.*, 294 U.S. 87.

Section 16 (b) of the Act states that any employer who violates the provisions of sections 6 and 7 (the minimum wages and maximum hours sections, which contain the overtime pay provisions) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation, as the case may be, and an additional equal amount as liquidated damages. Since the plaintiff by virtue of the Act is an employer, he is equally liable for violation of the Act as is the defendant, his employer. Thus to allow the plaintiff to recover is in effect allowing a joint wrongdoer to recover from one *in pari delicto.*

B. The plaintiff is estopped from recovery by his own acts, failure to act, negligence, or neglect of duty.

1. The jury by its verdict has excluded any question of wilful intent on the part of the plaintiff to defraud the defendant. This discussion must be limited, therefore, to the plaintiff's negligence and dereliction in duty.

The plaintiff's claim for overtime covers a period of slightly more than three years, from October 24, 1938, to October 27, 1941. During the first two months of this period he was office manager and accountant of the defendant by his own designation (R. p. 92, X-Q. 476). The balance of the period, or for two years and ten months, he was duly elected treasurer and director of the defendant (R. p. 61, Qs. 96, 97, 98). As previously stated, during the entire three-year period it was his duty to keep accurate books of account, among which were the records of the office employees' time and overtime (R. p. 90, X-Q. 451, p. 108, X-Q. 675). His case is based upon his allegation and testimony that he was an office employee (R. p. 83, X-Q. 348). He did keep such records and he did pay the other office employees their regular and overtime pay, but

he never kept a record of his own overtime (R. p. 183, X-Q. 1421), nor did he pay himself therefor. No one else had charge of these records. The record shows that a substantial amount of the alleged overtime was done at the plaintiff's home (R. p. 241). He never made a claim for overtime until he left the defendant's employment (R. p. 98, X-Qs. 559, 561, 562). He was familiar with the terms of the Act and knew its requirements and penalties (R. pp. 115, 116, X-Qs. 749, 752, 753). He testified that he was in doubt as to his status under the Act, but never brought that doubt to the attention of the other officers or directors of the company (R. p. 182, Q. 1416, X-Qs. 1419, 1420, and R. p. 241), nor did he bring to the attention of the other officers or directors of the defendant his conference with a government agent in September of 1941, wherein the agent told him he was entitled to overtime (R. pp. 208, 209).

It is submitted that on this evidence, which came wholly from the plaintiff himself, he was estopped by his negligence or dereliction of duty to the defendant (Opinion of Circuit Court of Appeals, R. pp. 241-242).

2. Ordinarily, an intent to deceive is required for estoppel. However, there may be substituted for that intent, neglect. It is not essential that there should be an intentional wrong, but a neglect of duty owing to the person claiming the estoppel will suffice. Negligent ignorance can give rise to estoppel.

> See 21 Corpus Juris, p. 1169, and cases cited.
> See *O'Heron* v. *Grey,* 168 Mass. 573, 577.

This suit itself is sufficient evidence of harm and change of position on the part of the defendant, nor can the fact that the defendant relied upon the plaintiff be seriously disputed, for he was treasurer, director, and sole official responsible for keeping proper time reports and paying

the employees all time and overtime due them. Likewise there was a damaging change of position by the defendant, since double liquidated damages are mandatory under the Act.

Rigopoulos v. *Kervan,* 47 Fed. Supp. 576.
Anuchick v. *Trans-American Freight Lines,* 46 Fed. Supp. 861.

3. Estoppel has been successfully used as a defense to suits for overtime under the Act.

Mortenson v. *Western Light & Telegraph Co.,* 42 Fed. Supp. 319.
Munkens v. *1412 Broadway, Inc.,* 50 Fed. Supp. 632.
Charles W. Gale v. *Fruehauf Trailer Co.,* Kansas Supreme Court No. 35,963 (Jan. 22, 1944).

Estoppel is an equitable defense, and its use and application are peculiar to the facts of each different case.

Munkens v. *1412 Broadway, Inc., supra.*

It is, therefore, submitted that on the peculiar facts of this case, whereby the defendant finds itself at the mercy of the plaintiff in that the defendant, being an inanimate person, had to rely upon the plaintiff as its treasurer for proper records of overtime, the equitable defense of estoppel should have been leniently and liberally interpreted by the Circuit Court of Appeals to give a fair and just result so as to give effect to the true intent of the Act and prevent the Act from producing legislative or judicial brigandage.

Williams v. *Jackson Terminal Co.,* 35 Fed. Supp. 267; 118 Fed. (2d) 324; 315 U.S. 386.

4. The plaintiff's delay in asserting his claim is an element to be considered in estoppel.

Brown v. *Carter Drilling Co.*, 48 Fed. Supp. 489.
See *Wilkinson* v. *Noland*, 40 Fed. Supp. 1009.

5. The plaintiff should not benefit by his own failure to keep proper records any more than an employer may benefit by such failure.

Cf. *Ling* v. *Currier Lumber Co.*, 50 Fed. Supp. 204, 209.

II. The plaintiff appellee was a *bona fide* executive official as defined by the Act and the regulations issued thereunder by the Administrator.

A. The plaintiff was an executive employee at least from October 24, 1940, until his resignation. The requirements for an executive are set forth in Regulations 541.1 (see Appendix, p. 26). For the purpose of this argument the petitioner will assume that the plaintiff did not satisfy the sixth requirement (Regulations 541.1 (F)) from October 24, 1938, to October 24, 1940, because of the jury's findings. It is admitted and so assumed by the Circuit Court of Appeals that he did satisfy the first five requirements (R. p. 242).

Your petitioner, however, contends that from October 24, 1940, which was the date of the new regulations, until the plaintiff's resignation, he not only satisfied the first five requirements, but on the evidence, and the jury might have so found if they had been instructed in accordance with the petitioner's request for instructions No. 20,* he satisfied the sixth, or 541.1 (F).

*"20. The jury should be instructed that the plaintiff's hours of work of the same nature as that performed by non-exempt employees

Section 541.1 (F) reads as follows:

> "(F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the work-week by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment."

Your petitioner contends that this regulation means that an employee, to qualify as an executive, cannot perform work of the same nature as that performed by non-exempt employees under his direction for more than twenty per cent of the number of hours worked in the work week by all of the non-exempt employees under the direction of the employee whose status is being determined. In other words, the basis for estimating the twenty per cent is the total number of hours worked by all of the employees under the direction of the one whose status is under consideration. The lower court refused to instruct the jury as requested on this point. The Circuit Court of Appeals upheld the lower court and decided that although the above regulation, construed grammatically, meant what your petitioner says it does, nevertheless it should not be so construed and must be held to mean that the employee shall not work more than twenty per cent of his own time doing the same kind of work as non-exempt employees under his direction. The Circuit Court of Appeals decided that the Administrator could not have meant what he said.

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must exceed twenty per cent of the total number of hours of all the non-exempt employees under his direction in order to exclude the plaintiff from the executive class of corporate employee as defined in Regulations, Part 541, Section VI, entitled 'Executive Employees' recommended definition Section 541.1, Paragraph (f)."

The problem involved is not actually one of construction or interpretation, although the Circuit Court of Appeals has so considered it to be. Your petitioner submits that the construction or interpretation of a statute (or regulation) implies an ambiguity in the language used therein. Here the language used is grammatically clear and unambiguous, and the Circuit Court of Appeals in its opinion on page 243 of the Record so states, as follows:

> "We must admit that grammatically construed the Regulation means what the defendant says that it does."

It is a cardinal rule of law that, where the language of a statute is clear, it must be complied with, even though the statute contains a provision for liberal construction. Where the language of a statute is plain and unambiguous, there is no occasion for construction (59 Corpus Juris, 953 *et seq.*, and cases cited; *United States* v. *Missouri-Pacific Railroad*, 278 U.S. 269). Even though other meanings could be found, the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature (or of the Administrator, to whom the legislature has delegated its power). The statute (or regulation) must be given effect according to its plain and obvious meaning and cannot be extended beyond it because of some supposed policy of the law or because the legislature did not use proper words to express its meaning, or the court would be assuming legislative authority (see above reference to 59 Corpus Juris, 953 *et seq.*). Where the language is clear and unambiguous, but at the same time incapable of reasonable meaning, the court cannot construe the statute to give it a meaning. The court cannot attribute to the legislature an intent which is not in any way expressed in the statute (see 59 Corpus Juris, 958,

and cases cited, and *Northern Pacific Railroad* v. *Concannon*, 239 U.S. 382).

The regulation in question is issued by the Administrator through the power granted him by the Act itself (section 13 (a) (1) of the Act). It thus has the same force and effect as the statute itself. It must, therefore, be subject to the same rules of construction as the statute, and the law quoted above applies with equal force to regulations. Thus the Circuit Court of Appeals erred in attempting to give the regulation a meaning different from what it clearly says. Your petitioner submits that this departure from the rules of statutory construction is sufficient evidence for granting the writ of certiorari.

III. If the Act itself must be applied literally according to its words, the regulations interpreting the Act must likewise be applied literally according to their grammatical meaning, and the Circuit Court of Appeals erred in applying the Act literally and not applying the regulations literally.

These two points have been fully argued in the preceding section of the brief. They are submitted here for the purpose of pointing out the inconsistency of the opinion of the Circuit Court of Appeals. In its opinion (R. p. 242) the Circuit Court of Appeals states that "the statute must be applied literally according to its words and recovery allowed for the full amount permitted by the Act." Further on (R. p. 243) the Circuit Court of Appeals says: "Grammatically construed the Regulation means what the defendant says that it does. . . . In view of the arbitrary result which would follow from interpreting the Regulation as the defendant would have us, we do not think that the Administrator could have meant exactly what he said." These two quotations speak for themselves. On the one hand the statute must be taken to mean what the words

say, and on the other hand the regulations issued under authority of the statute do not mean what they say. In view of your petitioner's contention that the regulations have the same force and effect as the Act itself, which in section 13 (a) (1) gives the Administrator power to define and delimit the terms "executive" and "administrative" employees, it would seem that the use by the Circuit Court of Appeals of two different rules of construction for the same purpose is unfair and inequitable and should be reviewed by this Court.

IV. The verdict of the jury was in such a form that no monetary damage could be legally awarded the plaintiff, and therefore judgment should not have been entered for the plaintiff in the sum of $6866.11 and the Circuit Court of Appeals erred in sustaining the lower court's dismissal of the defendant's motion for a new trial by failing to pass on this point in its opinion.

It has been held that damages for overtime under the Act must be awarded on a weekly basis.

> *Overnight Transportation Co.* v. *Missel*, 316 U.S. 572.

The jury's verdict was that the plaintiff worked 225 hours overtime the first year, 185 hours overtime the second year, and 500 hours overtime the third year. The plaintiff's evidence was that on February 1, 1941, his salary was raised from $325 a month to $425 a month (R. p. 62, Q. 108). The jury found, as we have stated above, that the plaintiff worked 500 hours overtime from October 24, 1940, to October 27, 1941. From this finding it is impossible to determine what part of the 500 hours the plaintiff worked between October 24, 1940, and February 1, 1941, at $325 a month, and how many hours he worked at $425 a month

from February 1, 1941, to the end of his employment. Thus the entry of the judgment by the lower court in the sum of $6866.11 was based upon pure conjecture so far as the last year's overtime pay is concerned. The failure of the Circuit Court of Appeals to rule on this point should be reviewed by this Court.

Conclusion.

Wherefore your petitioner respectfully submits that the petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit should be issued for the foregoing reasons.

Respectfully submitted,

PAUL B. SARGENT,
Counsel for the Petitioner.

Of Counsel:
VARNUM TAYLOR,
WM. GARDNER PERRIN.

Appendix.

[PUBLIC—No. 718—75TH CONGRESS]
[CHAPTER 676—3D SESSION]
[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above

referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * * * * * *

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

* * * * * * * * *

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such

home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.[1]

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).[1]

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into

dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

* * * * * * * * *

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any

kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

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[1] Amendment provided by Act of August 9, 1939 (Public No. 844, 76th Congress. 53 Stat. 1266).

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

* * * * * * * * *

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

TITLE 29, CHAPTER V
CODE OF FEDERAL REGULATIONS
PART 541

Part 541—

REGULATIONS

Defining and Delimiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, Professional, or Local Retailing Capacity, or in the Capacity of Outside Salesman"

Pursuant to Section 13 (a) (1) of the Fair Labor Standards Act of 1938

Section 541.1.—Executive.

The term "employee employed in a bona fide executive * * * capacity" in section 13 (a) (1) of the act shall mean any employee—

(A) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

(B) who customarily and regularly directs the work of other employees therein, and

(C) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and

(D) who customarily and regularly exercises discretionary powers, and

(E) who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities), and

(F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed

20 percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment.

Section 541.2.—Administrative.

The term "employee employed in a bona fide * * * administrative * * * capacity" in section 13 (a) (1) of the act shall mean any employee—

(A) who is compensated for his services on a salary or fee basis at a rate of not less than $200 per month (exclusive of board, lodging, or other facilities), and

(B) (1) who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in these regulations), where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment; or

(2) who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or

(3) whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment; or

(4) who is engaged in transporting goods or passengers for hire and who performs, under only

general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties require the exercise of discretion and independent judgment.

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(31)

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 908.

GEORGE LAWLEY & SONS CORPORATION,
Defendant, Appellant,

v.

CHARLES J. SOUTH,
Plaintiff, Appellee.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS H. MAHONY,
Counsel for Plaintiff, Appellee.

JOSEPH G. BRYER,
Of counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

	Page
Statement of the case	1
Points to be discussed	1
Argument	2

Table of Authorities Cited.

Cases.

Angello v. Hanover Trust Co., 253 Mass. 160	3
Barton v. Morin, 281 Mass. 98	3
Boston & Albany R.R. v. Reardon, 226 Mass. 286	4
Commonwealth Fin. Corp. v. Holland System, 263 Mass. 10	3
Drenne v. Mutual Life Ins. Co. of N.Y., 6 Labor Cases No. 61492	5
Federal Trade Commission v. Bunte Bros., 312 U.S. 349	5
Lewis v. Nailling, 36 Fed. Supp. 187	4
Lunt v. Aetna Life Ins. Co., 261 Mass. 469	4
Novo v. Employers Lia. Assur. Corp., 295 Mass. 232	4
Robbins v. Bay View Auto Parts Co., 239 Mass. 414	4
Shaw v. Pinkham, 128 Me. 376	3
Taylor v. Jones, 242 Mass. 210; cert. den. 260 U.S. 742	3
United States v. American Trucking Assoc., 310 U.S. 534	5
United States v. Darby, 312 U.S. 100	5
Walling v. Cohen, 48 Fed. Supp. 859	5

Statutes.

Code of Federal Regulations, sec. 541.1F	6
Federal Rules of Civil Procedure, Rule 58	6

Textbooks.

19 Am. Jur. 856	4
31 C.J.S. p. 345	2

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 908.

GEORGE LAWLEY & SONS CORPORATION,
Defendant, Appellant,
v.
CHARLES J. SOUTH,
Plaintiff, Appellee.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The case has been stated in the petition filed in the case.

Points to be Discussed.

I. There was no estoppel from recovery for overtime by the plaintiff, appellee (herein afterwards referred to as the plaintiff), and the trial judge correctly instructed the jury on this question.

II. The plaintiff was not exempt from the benefits of the Act by reason of being a bona-fide executive or administrative official as defined by the Act.

III. The regulations interpreting the Act as promulgated by the Administrator are in no way binding on the Court in interpreting the Act.

IV. The verdict of the jury required the Court to enter judgment in the amount which it did.

Argument.

I. The plaintiff was not estopped from recovering overtime.

The defendant was not entitled to instructions to the jury in the form requested.

These requests were not a correct statement of the law of estoppel and if given by the trial judge would have been highly objectionable.

> "To constitute an estoppel, it is essential that the party charged therewith should have done or refrained from doing some act or pursued some cause of conduct on which estoppel may be based, and that in taking the former position he should have acted with knowledge of his rights, and have been aware of the facts in respect to the estoppel claimed. In addition it is essential that the party invoking the estoppel should have been misled by the acts or conduct of the party against whom the estoppel is claimed, that he changed his position in reliance thereon, and was justified in so doing and that he was prejudiced thereby, or a benefit resulted to the party against whom the estoppel is claimed."
>
> 31 C.J.S. p. 345.

The defendant in its requests stated only half the rule. The Court gave that part of the rule in substance and went

on and instructed the jury fully as to the second part of the rule. It was for the jury to decide whether all the elements were present. It might be argued that the jury might have found either way on the issue, but it certainly cannot be claimed that there was no evidence for their consideration.

Estoppel is a question of fact for the jury on all the evidence.

Commonwealth Fin. Corp. v. *Holland System*, 263 Mass. 10:

"It was for the jury on all the evidence to find whether the plaintiff's agent, by remaining passive at a time when his silence might produce an erroneous impression, created an estoppel which thereafter precluded it from asserting title."

See also *Shaw* v. *Pinkham*, 128 Me. 376.

"Whether estoppel has been established is a question of fact, where it is possible to draw more than one inference from the evidence."

Taylor v. *Jones*, 242 Mass. 210; cert. den. 260 U.S. 742.

"In order to work an estoppel it must appear that one has been induced by the conduct of another to do something different from what otherwise might have been done and which has resulted to his harm, and that the other knew or had reasonable cause to know that such consequence might follow. But the doctrine of estoppel is not applied except when to refuse it would be inequitable."

Angello v. *Hanover Trust Co.*, 253 Mass. 160, at 167.

Barton v. *Morin*, 281 Mass. 98.

The law does not regard estoppels with favor, or extend them beyond the requirements of the transactions in which they originate.

Lunt v. *Aetna Life Ins. Co.*, 261 Mass. 469, 473.
Robbins v. *Bay View Auto Parts Co.*, 239 Mass. 414, 420, 422.
Boston & Albany R.R. v. *Reardon*, 226 Mass. 286, 291.

The burden of proof was upon the defendant to establish such estoppel by a fair preponderance of the credible evidence.

Novo v. *Employers Lia. Assurance Corp.*, 295 Mass. 232, 234.
Lunt v. *Aetna Life Ins. Co.*, 261 Mass. 469, 472, 473.

It was therefore incumbent upon the defendant to establish the proposition that, as a matter of law upon all the facts the Trial Court was bound to rule that the plaintiff was so estopped.

It is the duty of the Court to charge and define the law applicable to estoppel, but it is the province of the jury to say whether the facts of the particular case constitute estoppel as defined by the Court.

19 Am. Jur. 856.

In a number of cases under the Act the employers have sought to set up estoppel as a defense. Cases where the question has been raised include *Lewis* v. *Nailling* (D.C. Tenn., 1940), 36 Fed. Supp. 187, where it was held that recovery was not barred by the employee's failure to demand the sum due prior to the institution of the action or because of his anticipation of and accumulation of evidence

for the action during his employment; also *Drenne* v. *Mutual Life Ins. Co. of N.Y.* (N.Y., 1943), 6 Labor Cases No. 61492, where it was held an employee was not estopped from recovery merely because he failed to state to his employer that his employment was subject to the Act and to demand overtime pay under its provisions.

The Trial Court gave ample and exhaustive instructions on the question of estoppel. The defendant noted no objection thereto. Its objection is limited to the failure of the Court to give requests Nos. 13 and 14. Clearly these were not a correct statement of the law. Counsel for the defendant in his closing argument had conceded that the plaintiff had no dishonest purpose but was honest in his conduct throughout (R. p. 41). He therefore left it with the jury that no improper motive actuated the plaintiff with reference to the whole transaction.

II. The defendant in its brief overlooks this force of the interpretations expressed in interpretative bulletins. They are not binding on the Courts, but are only entitled to great weight.

United States v. *American Trucking Assoc.*, 310 U.S. 534.
Walling v. *Cohen*, 48 Fed. Supp. 859.
United States v. *Darby*, 312 U.S. 100.
Federal Trade Commission v. *Bunte Bros.*, 312 U.S. 349.

If the Administrator provided for in the Act has stultified himself by an absurd interpretation of the Act in defining a bona-fide executive in administrative positions in the set-up of an employer's staff, the Court is bound to disregard it. The absurdity of the position taken by the defendant is set out in the opinion of the Circuit Court of Appeals. It would mean that if a concern had more than

five employees then the definition contained in section 541.1F of the Regulation would never apply.

III. The argument advanced and authorities cited under II have equal force and applicability to this issue.

IV. The Court found no difficulty in entering judgment under Rule 58 F.R.C.P. The amount of unpaid overtime compensation was fixed at $2864.09. Figuring this back, it is clear how it was arrived at:

In the period from October, 1938, to October, 1939, the jury found the plaintiff was entitled to 225 hours. The rate per hour during all this period was $2.556 (R. p. 60), it being a 44-hour week, making a total of	$575.10
For the period from October, 1939, to October, 1940, the jury found that the plaintiff was entitled to 185 hours overtime. The rate during this period was $2.678 per hour (R. p. 60), it being a 42-hour week, making a total of	495.43
The last period, October, 1940, to October, 1941, presents some complication at first glance, due to the change of rate in February, 1941, and the fact that the jury found for a lesser amount of hours than the plaintiff claimed. By taking all the hours testified to by the plaintiff as having been worked by him before the change in rate at the lower rate we have 52½ hours at $2.8125, equalling	147.66
and the balance of the 500 hours found by the jury at the higher rate, to wit, 447½ at $3.67 per hour, totalling	1,645.90
making a total of	$2,864.09

This was the amount fixed by the Court in its judgment.

It is evident that during the last period, when there was a change in the rate of pay, the Court took all the overtime to which the plaintiff had testified and computed the amount due thereon up to that date at the established rate. The number of hours deducted by the jury from the plaintiff's claim of overtime was taken by the Court from the period when the higher rate prevailed. The defendant could not be harmed by this procedure; as a matter of fact he undoubtedly benefited in a substantial degree. From this it appears that the defendant received the benefit of a maximum allocation of the hours of overtime found to have been worked by the plaintiff to the lower rate. If the Court was able to arrive at a figure that was based on an intelligent analysis of the special verdict of the jury, it seems that it should be adopted. In any event, the defendant saved no rights to the entry and made no objection thereto.

The plaintiff submits that the petition for a writ of certiorari should not be granted. The defendant has not argued the question involved in the allegation in its petition that the problems inherent in this case involve an important question of Federal law which has not been settled by this Court. We assume he does not stress the point, but in any event it is apparent on the record that no such question is involved. The validity of the Act has been passed upon many times by this Court. The citation of authority for this proposition seems unnecessary.

Respectfully submitted,

THOMAS H. MAHONY,

Counsel for Plaintiff, Appellee.

JOSEPH G. BRYER,

Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 908

GEORGE LAWLEY & SON CORPORATION, PETITIONER

v.

CHARLES J. SOUTH

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

As the petition for certiorari in this case raises a question as to the proper construction of regulations issued by the Administrator of the Wage and Hour Division, pursuant to the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201), we deem it appropriate to file this memorandum as *amicus curiae* on his behalf on that point. See *Illinois Commerce Comm.* v. *Thomson*, 318 U. S. 675, 681. The Regulations[1]

[1] Regulations, as amended, Title 29, Chapter V, Code of Federal Regulations, Part 541, 5 F. R. 4077. The portion of these Regulations pertaining to the term "executive" is printed as Appendix I.

involved are those defining the term "bona fide executive capacity" and the other terms included in Section 13 (a) (1) of the Act. Section 13 (a) (1) provides an exemption to:

> * * * any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); * * *

The specific provision of the Regulations in question here is subsection (F) which provides as one of the qualifications for a "bona fide executive," the following:

> (F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed twenty percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment.

Petitioner contends that "the basis for estimating the 20 percent is the total number of hours worked by all of the employees under the direction of the one whose status is under consideration" (pet. 13). The Court of Appeals correctly held that this construction was unwarranted. In rejecting petitioner's interpretation, the court below stated that while a literal grammatical read-

ing of the provision seemed to support defendant's contention, it was unreasonable so to construe the provision, for the result of such a construction would be that "every employee, no matter what his duties, would be exempt under this clause of the definition if there were 5 or more employees working under him" (R. 243). This, the court said, would be an arbitrary result which it would not presume was intended by the Administrator, as there were other possible, more reasonable interpretations, namely: (1) that the provision meant 20 percent of the standard workweek each one of the employees under plaintiff's direction "customarily worked," or (2) that it meant 20 percent of the plaintiff's time. The court pointed out that under either one of these interpretations the evidence supported the conclusion that plaintiff was not exempt.

The first alternative suggested by the court below is the one intended by the Administrator, as is expressly pointed out in the printed report[2] explaining the Regulations, which apparently was not brought to the attention of the Circuit Court of Appeals. On page 15 of the Report it is

[2] Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition of "Executive, Administrative, Professional * * * Outside Salesman," effective October 24, 1940, which was officially adopted by the Administrator as his construction of the regulations. The pertinent paragraphs from this Report are printed as Appendix II.

pointed out that the base to be used in applying the 20 percent is "the standard workweek of the employees under the direction of the executive in question." As a practical example the Report states that where the standard workweek approximates 40, it would be proper to take as the base, in applying the 20 percent rule, the 40-hour week and consider 8 hours per workweek as the maximum allowance of non-exempt work. This makes it clear that it was intended that the standard or average workweek of the non-exempt employees was to be used as a base, and not the total of all the hours of all of the employees. This construction has been followed by the Administrator consistently since the adoption of the Regulations in October 1940.[3]

[3] The following opinions are representative of the Administrator's interpretations:

(1) Opinion dated February 9, 1944, from the chief attorney of the Wage Hour Section to the regional attorney in Philadelphia, with respect to a problem concerning employees of Henry Disston & Sons, Inc., Philadelphia, Pennsylvania. The memorandum contains the following paragraph with respect to the 20 percent limitation:

"The 20-percent limitation on nonexempt work laid down in subdivision (F) of section 541.1 must be measured by the *standard* workweek of the employees under the direction of the executive employee in question. (See Stein report, page 15.) In the instant case, since twelve of the 14 employees supervised by the executive in question regularly work 48 hours a week, such workweek is the standard workweek. Therefore, the executive may spend no more than 9.6 hours a week on nonexempt work without losing the exemption (20 percent of 48 hours). The same limitation is effective

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MAGGS,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,
United States Department of Labor.

MAY 1944.

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in those weeks in which the employees work a number of hours in excess of the regularly scheduled workweek, since the standard workweek of 48 hours is unchanged."

(2) Memorandum dated February 29, 1944, from the chief attorney, Wage Hour Section, to the regional attorney in Dallas, Texas, relative to a problem concerning employees of the Southwestern Bell Telephone Company. The memorandum contains the following statement with respect to subsection (F):

"* * * we direct your attention to the requirement that the 20-percent limitation in subdivision (F), section 541.1, is based on the *standard workweek* of the nonexempt employees under a supervisor's direction (Stein report, page 15)."

APPENDIX I

REGULATIONS, AS AMENDED, TITLE 29, CHAPTER V—CODE OF FEDERAL REGULATIONS

PART 541

SECTION 541.1.—EXECUTIVE.

The term "employee employed in a bona fide executive * * * capacity" in section 13 (a) (1) of the Act shall mean any employee—

(A) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

(B) who customarily and regularly directs the work of other employees therein, and

(C) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and

(D) who customarily and regularly exercises discretionary powers, and

(E) who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities), and

(F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed twenty percent of the number of hours worked in the workweek by the nonexempt em-

ployees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment.

APPENDIX II

UNITED STATES DEPARTMENT OF LABOR

WAGE AND HOUR DIVISION

WASHINGTON, D. C.

"EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL * * * OUTSIDE SALESMAN" REDEFINED

Effective October 24, 1940

REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER AT HEARINGS PRELIMINARY TO REDEFINITION

Pages 13, 14, and 15

"WORK OF THE SAME NATURE AS THAT PERFORMED BY NONEXEMPT EMPLOYEES"

Much of the criticism of section 541.1 was directed at the phrase "who does no substantial amount of work of the same nature as that performed by nonexempt employees of the employer." This criticism was twofold in nature. In the first place, the clause was strenuously objected to by those who found it vague and ambiguous and who felt that it has led to conflicting results in the actual administration and enforcement of the act. It was also objected to by another group of employer representatives who felt that however clarified, it would operate to disqualify a group of employees whom they wished to exempt.

The first point to be considered is the alleged ambiguity of the phrase "who does no substantial amount of work of the same nature as that performed by nonexempt employees of the employer." It is undoubtedly true that this phrase has proved difficult of administration. Many proposals were received, not unnaturally, to drop the phrase entirely, but upon closer scrutiny, the proponents usually admitted that deletion of the phrase would not solve the problem. It was freely admitted that an employee who is an executive 1 hour a week should not qualify for the exemption. The deletion of this phrase would then throw the same problem of interpretation on the words "primary duty," found earlier in the definition. "Primary duty" would then become subject to the same controversy that has already arisen over "substantial amount of work."

FIXED PERCENTAGE SUGGESTED

As an alternative to deletion, it was suggested that the phrase be defined in terms of fixed percentage. There is little doubt that any percentage that might be taken as an arithmetical equivalent of the word "substantial" must be somewhat arbitrary in nature and will cause some hardship. It will exclude certain employees from the exemption who probably might well be permitted exemption. On the other hand, it will permit the exemption of certain employees who probably should be entitled to the benefits of the Act. Nevertheless, even if full weight is given to the difficulties that inhere in the choice of a quantitive measurement, this remains the most practical solution of a difficult problem.

* * * There are, of course, any number of ways in which the word "substantial" might be translated into numerical terms. A number of employers and employer representatives suggested that "substantial" should be considered over 50 percent. However, a number of employers agreed that this was an unduly large allowance for a person who is considered as employed in a "bona fide executive capacity." Among other proposals was one that "substantial" should be interpreted to mean not more than 20 percent. The recognition of the fairness of this by quite a few employer groups would seem to be an adequate assurance that it will not work hardship on employers. * * *

BASED ON HOURS WORKED BY NONEXEMPT EMPLOYEES

In the proposals for adopting a percentage criterion there was usually no indication as to the base upon which the percentage should be taken. When this defect was pointed out the proponents agreed that it was proper to use as a base the standard workweek of the employees under the direction of the executive in question. If the base were the workweek of the employee himself, he could obtain exemption merely by increasing his hours of exempt work. In such instances the rate per hour paid the exempt employee would frequently fall below the hourly rate paid the nonexempt employees. Such a rule would encourage excessive hours of work. As a matter of administrative convenience, it will be proper in all normal situations, where the hours of work approximate 40, to take as a base for computa-

tion the 40-hour week that is established as the permanent standard under the act and consider 8 hours per workweek as the maximum allowance of nonexempt work. Unusual situations can be handled by the strict arithmetical application of the 20 percent rule; thus where the nonexempt employees work, for example, 30 or 50 hours, the allowance would be 6 and 10 hours respectively.

U. S. GOVERNMENT PRINTING OFFICE: 1944